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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-362

ROGERS C. B. MORTON, Secretary of the Interior, et al., *Appellants,*

VS.

C. R. MANCARI, et al., *Appellees.*

No. 73-364

AMERIND, *Appellant,*

VS.

C. R. MANCARI, et al., *Appellees.*

On Appeal from the United States District Court for the District of New Mexico

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MOTION OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF) requested the parties in these cases to consent to filing the attached brief ami-

cus curiae. Only Appellants have granted their consent.[1]

MALDEF was established on May 1, 1968, as a nonprofit corporation incorporated under the laws of the State of Texas, primarily to provide legal assistance to Mexican Americans (Chicanos).[2] It is headquartered in San Francisco, with additional offices in San Antonio, Los Angeles, Denver, Albuquerque, and Washington, D.C.

As Courts frequently have recognized, Mexican Americans constitute a separate group which historically has been subject to illegal and pervasive discrimination in our society.[3] MALDEF, in its efforts to assist the Mexican American community achieve its rights under law, is actively involved in litigation to challenge the traditional barriers with which Mexican Americans are faced: abridgment of participatory constitutional, civil, and political rights; unequal educational opportunities; unequal distribution of public services; law enforcement misconduct; and discriminatory employment practices.

The questions presented in these instant cases arise out of an action brought in the United States District Court for the District of New Mexico seeking to enjoin implementation and enforcement of 25 U.S.C. §§44, 46, and 472, the Indian Preference Statutes, as

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[1]The letters of consent have been filed with the Clerk.

[2]Currently the word Chicano is used interchangeably with the term Mexican American.

[3]*E.g., Hernandez v. Texas*, 347 U.S. 475 (1954); *White v. Regester*, 93 S.Ct. 2332 (1973); *Keyes v. School District No. 1, Denver, Colorado*, 93 S.Ct. 2686 (1973).

violative of the Fifth Amendment to the Constitution and contrary to Section 717 of the Equal Employment Opportunity Act of 1972, amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16.

In No. 73-362 Appellees Mancari, et al., brought a class action on behalf of themselves and all other employees of the Bureau of Indian Affairs (B.I.A.) who are of less than twenty-five percent Indian blood. In No. 73-364 Appellant Amerind intervened in the above-mentioned class action.

A three-judge district court was convened to hear Appellees' claim which sought to enjoin the Appellants in No. 73-362 from implementing and enforcing, pursuant to the Indian Preference Statutes, a B.I.A. policy which gives preference to persons of one-quarter or more Indian blood in initial hiring, training, promotion, and reinstatement. The three-judge district court entered an order enjoining the enforcement of the Indian Preference Statutes on the grounds that they were overridden by Section 717 of the Equal Employment Opportunity Act of 1972.[4]

MALDEF has litigated numerous suits attacking discriminatory and illegal employment practices affecting the lives and liberties of Mexican Americans and other minorities. The theory of many of these suits is that the Constitution and federal civil rights laws fully protect, and in some circumstances man-

[4]The Opinion of the District Court is not yet reported although it has appeared in 5 FEP Cases 1321. The Opinion is also reproduced in the Jurisdictional Statement in No. 73-362, at p. 13.

date, good faith affirmative action employment programs.

MALDEF agrees entirely with the Appellants in No. 73-364 that the constitutionality of the Indian Preference Statutes is soundly predicated on several unique factors: the historic, legal, social and political status of the Indian Tribes within the United States; Congress' plenary power under the Indian Commerce Clause, U.S. Const. Art. I, §8, cl. 3; and the relationship between the B.I.A. and the Indian Tribes. However, since the decision of the Court in this litigation may affect the scope of 42 U.S.C. §2000e-16 and the Fifth Amendment more generally with respect to affirmative action programs and remedies, MALDEF deems it important to bring to the Court's attention some implications of the issues here presented by respectfully praying leave to file a brief amicus curiae in support of Appellants.

In the attached brief, MALDEF presents the argument that the District Court was not justified in holding that the Indian Preference Statutes must give way to the Civil Rights Act. The brief also argues that the Indian Preference Statutes can withstand constitutional challenge.

Respectfully submitted,

VILMA S. MARTINEZ,
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Mexican American Legal Defense and Educational Fund,
Attorneys for Amicus Curiae.

March, 1974.

In the Supreme Court
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BRIEF OF AMICUS CURIAE

ARGUMENT

I

THE INDIAN PREFERENCE STATUTES ARE NOT IN CONFLICT WITH TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972.

A. The Purposes of Both The Indian Preference Statutes And The Civil Rights Act Of 1964 As Amended By The Equal Employment Opportunity Act of 1972 Are To Secure For Minorities Equality of Employment Opportunity.

With the passage of the Indian Reorganization Act of 1934, which included 25 U.S.C. §472, Congress in-

tended to reform the Bureau of Indian Affairs (B.I.A.) by integrating the Native Americans into government service which affected the administration of their affairs.[5]

> Congress was anxious to promote economic and political self-determination for the Indian. Specific concern was directed to reforming the B.I.A., which exercised vast power over Indian lives but was staffed largely by non-Indians. Through the preference given to Indians by § 472, it was hoped that the B.I.A. would gradually become an Indian service predominantly in the hands of educated and competent Indians.

Mescalero Apache Tribe v. Hickel, 432 F.2d 956, 960 (10th Cir.), *cert. denied* 401 U.S. 981 (1971).

Although there have been some successful results in the implementation of the statutory preference (see Tr. 85),[6] to this day relatively few Native Americans occupy policy making positions within the B.I.A. See Note, *The Indian: The Forgotten American,* 81 HARV. L. REV. 1818, 1820 (1968).

The policy of preferring competent and qualified Native Americans in B.I.A. employment is a proper and legitimate response by Congress to practices of the B.I.A. which had failed to secure adequate em-

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[5] *See generally* S. Rep. No. 1080, 73d Cong., 2d Sess. at 1 (1934); Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. at 39 (1934); Hearings on S. 2755 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 9270 (remarks of Senator Wheeler), 11727, 11729, 1131-32 (remarks of Representative Howard) (1934).

[6] "Tr." refers to the transcript of the trial held November 29, 1972, which has been lodged with the Clerk by the Appellants in No. 73-362. See Appellants' Jurisdictional Statement, No. 73-362.

ployment opportunities to Native Americans prior to the passage of the Indian Preference Statutes. *Mescalero Apache Tribe v. Hickel, supra,* 432 F.2d at 958. Such preferential hiring or remedial affirmative action efforts have never been held by this Court to be inconsistent with Title VII of the Civil Rights Act of 1964 or the Equal Employment Opportunity Act of 1972. In fact the Court in *Griggs v. Duke Power Co.,* 401 U.S. 429 (1971), did not disapprove of the decision of the Court of Appeals to the extent that it had ordered that qualified minority victims of prior discrimination be preferred over other candidates for employment promotion.[7] Preferential hiring and promotions which operate to purge minorities of the consequences of discriminatory employment barriers obviously therefore are not the discriminatory preferences which Congress sought to proscribe. The

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[7]Although the Duke Power Company employed blacks and whites for its labor department, only whites were allowed to transfer into higher paying departments prior to 1965. When the company imposed a high school diploma and general intelligence tests as requirements for employment or promotion, blacks in the labor department were effectively locked-in that department, even though whites who had less seniority and had not met the new requirements were allowed to retain their prior unconditional promotions to other departments. "The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying department could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them." *Griggs v. Duke Power Co.,* 401 U.S. at 429, n. 4. By forbidding the company to apply these requirements to those blacks who had been on the job when the requirements were imposed, the Court of Appeals, in effect, required the employer to prefer black employees over white employees who might have been equally, if not more, qualified for promotion than the black employees. See also *Developments In The Law: Employment Discrimination And Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1291 (1971).

purpose of Congress in enacting Title VII of the Civil Rights Act of 1964 was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30.

Nothing in Title VII, as amended, or in its legislative history, reveals that it was Congress' purpose in any way to repeal or alter its prior determination that Native Americans should be granted employment preferences within the BIA. In fact, the purposes behind the two statutes are so consistent that the statutes themselves are fully compatible. Both Title VII as amended and the Indian Preference Statutes were intended to protect minorities from employment discrimination, and generally to improve the status of minorities who have been subject to historic and pervasive discrimination and deprivation. Implementation of these policies may frequently require preference of qualified minorities over similarly qualified whites in order to remedy practices which have resulted in discrimination against minorities.

This Court in *dicta* has expressed the view that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" in enacting Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431. By this the Court only meant that Congress has prohibited the establishment of reverse discrimination in order merely to attain racial balance. *United States v. Wood, Wire and Metal Lathers International Union, Local 46*, 471 F.2d 408,

413 (2d Cir. 1973). Notably, on the other hand, in actions under Title VII of the Civil Rights Act of 1964 as amended, "Congress has specifically granted authority to the trial courts to 'order such affirmative action as may be appropriate, which may include . . . hiring of employees . . . .' 42 U.S.C. §2000e-5(g)." *Carter v. Gallagher*, 452 F.2d 315, 330 (8th Cir. 1972) (opinion on *en banc* rehearing), *cert. denied*, 406 U.S. 950 (1972). And it is clear that the anti-preferential treatment section of Title VII, 42 U.S.C. §2000e-2(j),[8] does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices. *Carter v. Gallagher*, 452 F.2d at 329.

There is no doubt that the fashioning of affirmative action remedies presents practical problems which may differ significantly, depending on the circumstances, from case to case. Nevertheless, Congress has granted the courts broad powers to formulate relief enforcing the legislative mandate of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of

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[8] "Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

1972.[9] It does not follow that Congress has determined or the Constitution requires that, for purposes of formulating affirmative action consistent with the Constitution, findings of specific prior discriminatory acts are proper only if made by a judicial body, or that only the courts may fashion specific affirmative remedies. On the contrary, this Court has ruled, for example, that "§ 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966). When Congress exercises that power, this Court has instructed that judicial review is severely limited to a determination of whether the legislation is appropriate ". . . to enforce the Equal Protection Clause, that is, under the *M'Culloch v. Maryland* [17 U.S. (4 Wheat.) 316, 421 (1819)] standard, 'whether . . . [the statute] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is plainly adopted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the Constitution.' " 384 U.S. at 651.

Thus, the findings behind the Indian Preference Statutes, and the remedies implemented by these provisions, designed to effectuate the Indian Commerce

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[9]In fashioning affirmative remedies, such as preferential hiring, it has been recognized that "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." *Carter v. Gallagher,* 452 F.2d at 330.

Clause as well as the civil rights provisions in the Constitution, are not inconsistent with the findings behind Title VII, as amended, and the remedies effectuated by those provisions, designed to implement the Interstate Commerce Clause and the civil rights provisions in the Constitution. By their terms, and in all other respects, the Indian Preference Statutes are merely more specific than is Title VII, as amended.

B. The District Court Erred by Misapplying The Presumption Against Implied Repeals.

Amicus Curiae fully supports Appellants' position that the applicable rule in this case is that the enactment of a general law, such as Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972, ordinarily does not repeal more specific statutes, such as the Indian Preference Statutes, which limit their scope and application to a particular phase of the subject matter covered by the general law. To accomplish such a repeal the legislative purpose must be unequivocally expressed or the subsequent general statute must present an irreconcilable conflict with the prior special statute. See 1A Sutherland *Statutory Construction* §23.15 (1972).

Even assuming, as the District Court did, that this case does not involve a "simple instance of a relationship of a general statute to a special subject statute" (Appellants' Jurisdictional Statement, No. 73-362, App. A, p. 22), the District Court erred by failing to apply properly the different but also applicable pre-

sumption against repeals by implication. As the Sutherland treatise states:

> Interpretation of statutes with regard to the question whether they effect repeal of prior law by implication is conditioned by a judicially formulated and imposed assumption, or *presumption,* against change in the legal order.
>
> The bent of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible, even to the extent of superimposing a construction of consistency upon the apparent legislative intent to repeal, where two acts can, in fact, stand together and both be given consonant operation. Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its *consistent* operation with previous legislation.
>
> The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, . . . The presumption has been said to have special application to important public statutes of long standing.

1A Sutherland *Statutory Construction* §23.10 (1972).[10]

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[10]Furthermore prior laws on the same subject matter as subsequent statutes are to be construed so that effect is given to every provision of each statute and if such statutes are "in apparent conflict, [they] are so far as reasonably possible construed to be in harmony with each other." 2A Sutherland *Statutory Construction* § 51.02 (1972). See also *The Boys Markets v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970); *Northern Natural Gas Co. v. Grounds,* 441 F.2d 704, 719 (10th Cir. 1971).

It appears that the District Court was of the erroneous opinion that the burden of persuasion on this point ought to be on the Appellants. Accordingly the District Court mistakenly held that Appellants had not met their burden because they failed to introduce any evidence to support their position.

> There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion. *Griggs v. Duke Power Co.*, 401 U.S. 424. There was no evidence whatsoever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

(Appellants' Jurisdictional Statement, No. 73-362 App. A, p. 22.) But the presumption against implied repeal casts the burden of persuasion on the party arguing for repeal of the prior statute. Yet there is no evidence whatsoever on the face of Title VII, as amended, or in its legislative history, from which it can even be inferred that the Indian Preference statutes have been repealed or pre-empted.

II

THE INDIAN PREFERENCE STATUTES ARE NOT UNCONSTITUTIONAL

The District Court had before it the issue of whether the Indian Preference Laws on their faces or by their application were violative of the Fifth Amendment. Appellees took the position that the preference statutes deprive non-Indian B.I.A. employees of property without due process of law. Although deciding that "the preference statutes must give way to the Civil Rights Act," the District Court nevertheless also took the position that it "could well hold that the statute must fail on constitutional grounds." (Appellants' Jurisdictional Statement, No. 73-362, App. A, p. 23.)

Amicus curiae respectfully disagrees with the District Court's suggestion that there are sufficient grounds to hold the Indian Preference Statutes unconstitutional. Instead amicus curiae submits that Congress has reasonably determined that preferential treatment is necessary and proper not only to promote meaningful integration of Indians into the B.I.A. (*Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir.), cert. denied, 401 U.S. 981 (1971)) but also to increase employment opportunities for qualified Native Americans and to put them in the position to control the administration of programs uniquely designed to govern their lives. These congressional objectives, and the Indian Preference Statutes enacted pursuant thereto, are well within the plenary power which Congress expressly has been delegated under the

Indian Commerce Clause of the Constitution (Article 1, §8, cl. 3). *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), *aff'g* 306 F. Supp. 279 (C.D. Cal. 1969).

Further, amicus curiae maintains that the statutes do not violate the Due Process clause of the Fifth Amendment. In evaluating the latter argument, it must be kept in mind that the constitutional issue raised is not whether the Constitution requires the B.I.A. to prefer qualified Native Americans in its employment. Rather the issue is whether the Equal Protection Clause,[11] designed to protect minorities, permits Congress, through the exercise of its enumerated power under the Indian Commerce Clause, to require limited special treatment for the Native American minority after it has determined that such treatment is necessary to aid the Indian Tribes and to facilitate administration of B.I.A. programs.

The District Court's concern with the special treatment accorded to qualified Native Americans does not warrant the conclusion that such statutes are unconstitutional. The constitutional principle of equality in no way bars the Federal government from preferring qualified Native Americans in employment programs enacted for the purpose of eliminating from our so-

[11]There is no doubt that this Court has recognized the incorporation of an equal protection guarantee within the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). See *Frontiero v. Richardson*, 36 L.Ed.2d 583 (1973), where eight justices measured the federal statute at issue in that instance against the standards developed from Fourteenth Amendment decisions.

ciety the pervasive and historic deprivations suffered by Native Americans. See, generally, M. Price, LAW AND THE AMERICAN INDIAN (1973). Amicus curiae submits that the Equal Protection Clause, incorporated within the Fifth Amendment, does not require that all governmental programs be "color blind" nor does it prohibit consideration of race or ethnic background in attempts by government to correct racial or ethnic inequalities.

The notion that the Constitution is "color blind" was initially put forward by the first Justice Harlan in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), where he declared:

> But in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Justice Harlan was protesting, by his dissent, this Court's legitimization of racial segregation through adoption of the "separate but equal" test. Inadvertently, however, he laid the ground work for the arguments of those who oppose remedial or preferential treatment of minority group members even though both the purpose and the effect of this treatment is to bring about both integration and a realistic equal opportunity for members of disadvantaged minority groups.

However, this Court has never declared that all ethnic or racial distinctions and classifications are per se unconstitutional. At most the Court has ruled that

they are "suspect," carry a "very heavy burden of justification," and are subject "to the most rigid scrutiny." *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Loving v. Virginia,* 388 U.S. 1, 9 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964). The Court has even studiously declined recent invitations by Justices Douglas and Stewart, concurring in the *Loving,* 388 U.S. at 13, and *McLaughlin,* 379 U.S. at 198, cases, to declare a per se rule of unconstitutionality when criminal sanctions are to be imposed on the basis of "the race of the actor."

Amicus curiae submits that there is a good reason for the Court's apparent reticence. Laws and practices which have the purpose and effect of continuing or increasing the burdens on members of racial and ethnic minority groups, who have been subjected to historic and pervasive discrimination, are unconstitutional. On the other hand, laws and practices which have the purpose and effect of promoting integration and true equality of opportunity for members of such minority groups are constitutional.

In approaching the question of whether a law violates the Equal Protection Clause, this Court has articulated a tripartite analysis:

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. [Citation omitted.] In considering laws challenged under the Equal Protection Clause, this Court has evolved

more than one test, depending upon the interest affected or the classification involved.

Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (footnote omitted.)[12] Thus, where the basis for a classification is one which has been denominated by the Court to be "inherently suspect" or the individual interest affected is a "fundamental" constitutional right, the Court's standard of review is "exacting" (405 U.S. at 338) and "the Court must determine whether the exclusions are necessary to promote a compelling state interest" (405 U.S. at 437). Where the basis for the classification is not inherently "suspect" and the individual interest affected is not a "fundamental" constitutional right, the Court has held that ". . . the traditional standard of review . . . requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278, 1301 (1973). *Cf., Dunn v. Blumstein*, 405 U.S. 330 (1972).

It is not even arguable that B.I.A. employment is a fundamental constitutional right. Hence the only possible reason for applying the "exacting" test, under the Equal Protection Clause, to the Appellants' actions in the instant cases is the argument that the "basis for the classification" affected by the Indian Preference

[12]By "the character of the classification," the Court means "the basis for the classification," *e.g.*, recent interstate travel, race, national origin, alienage, sex. 405 U.S. at 335.

Statutes may be inherently "suspect." We must, therefore, determine what is meant by an inherently "suspect" classification.

Given the historic purposes of the Equal Protection Clause, the prime example of a "suspect" classification is one based upon race. *E.g., Brown v. Board of Education,* 347 U.S. 483 (1954); *McLaughlin v. Florida,* 379 U.S. 184 (1964). Other notable examples are national origin *(e.g., Oyama v. California,* 332 U.S. 633, 644-46 (1971)), indigency of a criminal defendant *(e.g., Griffin v. Illinois,* 351 U.S. 12 (1950)), and illegitimacy *(e.g., Gomez v. Perez,* 93 S.Ct. 872 (1973)); *Weber v. Aetna Casualty & Surety Co.,* 405 U.S. 164 (1972)).

Although the B.I.A. preference policy, pursuant to the Indian Preference Statutes, creates a classification that is based upon race or national origin, it does not automatically follow that such preferences are subject to the "exacting" test under the Equal Protection Clause. In fact several lines of the decision by this Court make it clear that the "exacting" test is inapplicable to this preference policy.

Amicus curiae knows of no decision in which this Court has applied the "exacting" test where suit was not brought challenging a governmental classification deemed to be disadvantageous to a minority and favorable to a majority. Obviously, the core purpose of the Equal Protection Clause was to effect a radical change in the status of the freedman, i.e., blacks. Extension of this constitutional protection to other minorities which have been subject to historic and

pervasive discrimination and deprivation at the hands of a majority followed as a matter of course.

All persons and groups who have heretofore received the protection of the strict scrutiny standard have been members of such identifiable classes for purposes of the Fourteenth Amendment. See, e.g., *Keyes v. School Dist. No. 1, Denver*, 93 S.Ct. 2686, 2691 (1973); *White v. Regester*, 93 S.Ct. 2332, 2340-41 (1973); *Hernandez v. Texas*, 347 U.S. 475 (1954). The members of each such class—whether it be defined by race, national origin, alienage, illegitimacy or indigency—share three notable characteristics. First, its members have been subjected to historic and pervasive discrimination and deprivations. Second, especially when the classification is based upon race or lineage, members of a suspect class share immutable characteristics that stigmatize them and set them apart from members of the majority group. See, *e.g.*, Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969). Finally, within society in general, but especially in the political arena, they are relatively powerless. As Professor Wechsler has observed of the *Brown* decision: ". . . it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." H. Wechsler, *Toward Neutral Principles of Constitutional Law* in H. Wechsler, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 3, 45 (1961). Thus, each of these classes is ". . . a prime example of a 'discrete and insular' minority (see *United States v.*

Carolene Products Co., 304 U.S. 144, 152-53, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 304 U.S. 365, 372 (1971).

Nothing in any decision of this Court suggests that a racial or national origin classification is subject to the "rigid scrutiny" standard when its benefits are bestowed upon the members of an identifiable class for purposes of the Equal Protection Clause, or its deleterious effects are neither intended to nor in fact fall upon the members of such a "discrete and insular" minority. *Cf., e.g., McDaniel v. Barresi*, 402 U.S. 39 (1971). Judicial precedent and common sense indicate to the contrary.[13]

This Court has itself specifically fashioned and legitimated race conscious remedies designed to eliminate or ameliorate the historic and pervasive effects of racial discrimination. See, *e.g., Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971). In enforcing federal laws against racial and national or-

[13]That non-Indian minorities are excluded from the benefits of the Indian Preference Statutes is irrelevant to the question of applicability of the "exacting" standard of review. First, Native Americans enjoy a special status under the Constitution, and the B.I.A. has a unique relationship to them and to their status. See generally Brief of Appellants in No. 73-364. Second, it is by no means clear that the "exacting" standard should apply to the determination of whether an affirmative action program is "under-inclusive". If it does so apply, the invitation for argument by "parade of horribles" clearly is irresistible. Thus once the purpose and effect of a special program is deemed to be beneficial to a minority the question of "under-inclusiveness" responds better to analysis according to the traditional rather than the "exacting" standard of review.

igin discrimination in employment, half of the United States Courts of Appeals have validated or directed preferential hiring and promotion remedies. At least two Courts of Appeals have specifically validated affirmative action preferential hiring programs imposed by non-judicial bodies. *Associated General Contractors v. Altshuler,* ____ F.2d ____, 6 FEP Cases 1031 (1st Cir. Nov. 30, 1973); *Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971).

Amicus curiae submits that in passing upon the validity of governmental programs that have both the purpose and the effect of providing an advantage to members of identifiable classes for purposes of the Equal Protection Clause, the courts are obligated to apply only the traditional test. They must determine only whether the preferences or "the benign classifications described are at least rationally related to achieving that purpose." Comment, *Developments in the Law—Equal Protection,* 82 HARV L. REV. 1065, 1107 (1969). For this Court's latest application of the traditional standard, see, *Marshall v. United States,* 42 U.S.L.W. 4121 (U.S. No. 72-5881, Jan. 9, 1974).

If the test to be applied is the traditional equal protection test of demonstrating that a preference bears a reasonable relationship to a legitimate governmental interest, then the B.I.A. preference policy, pursuant to the Indian Preference Statutes, is clearly constitutional. Both the purpose and the effect of the preference policy are to benefit members of a minority

group which has been subject to historic and pervasive discrimination and deprivations. The sordid history of oppression and its continuing effects upon the Native American minority in matters relating to health, education, welfare and employment need not be detailed here. It can hardly be argued that it is unreasonable and irrational for Congress, through enactment of the Indian Preference Statutes, to respond to the critical needs of Native Americans by increasing employment opportunity for them within the B.I.A. After serious consideration and based upon its experience in dealing with Indian matters, Congress concluded that an effective method to secure a substantial increase in Native American employees within the B.I.A. was to adopt the Indian Preference Statutes here at issue. Such statutes are constitutional because they are eminently reasonable, if not necessary, in promoting integration of Indians into the B.I.A. and in securing the rights of Native Americans who historically have been subject to gross and invidious discrimination. The preference policy follows a reasonable design and its operation is related to fulfillment of legitimate governmental purposes. Hence the preference policy is constitutional even though its limited operation may exclude non-Native Americans from a government benefit apparently on the ground of race or national origin.

Even if the more "exacting" test of equal protection is applied, the purpose, design and effect of preference policy overcomes "the inherently suspect" quality of the racial classification. In this respect the

suggestion of the court below would clearly be incorrect. It is too late in the day to suggest otherwise. See, *e.g.*, Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV., *supra*, at 1087-91.

The United States Court of Appeals for the Second Circuit has articulated the proper interpretation of Justice Harlan's "color blind" *dictum*. In an opinion by Judge Smith, that Court declared that government urban renewal agencies are under a special obligation to provide adequate replacement housing for minority group members displaced by renewal projects. Judge Smith specifically observed:

> What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968).

CONCLUSION

For the reasons stated in this brief, as well as reasons stated in other briefs in support of Appellants, amicus curiae submits that the decision of the court below should be reversed.

Dated, March, 1974.

Respectfully submitted,

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